RESOURCES MINING PTE. LTD.

v.

PUTEH ABDULLAH & ORS.

HIGH COURT, SINGAPORE
JOSEPH GRIMBERG JC
[SUIT NO. 1641 OF 1988]
6 JULY 1989
ORAL JUDGMENT
21 AUGUST 1989

CONTRACT: *Sale and purchase agreement - Conditions Precedent - Time of essence - Extension of time.*

CONTRACT: *Remedies - Declaration agreement still existing - Injunction - Ex parte interim injunction - Discharge on ground frivolous and vexatious - Balance of convenience.*

CIVIL PROCEDURE: *Lis pendesis declaration - Order 18 r. 19 - Inherent jurisdiction to strike out statement of claim.*

The plaintiff entered into 'the exchange agreement' with the 1st to the 6th defendants and 'the sale agreement' with the 7th and 8th defendants for the purchase of the defendants respective interest in two parcels of land.

The exchange agreement contained a condition precedent that a grant of written permission (the GWP) and building plan permission (building approval) in respect of the land be obtained by the plaintiffs within 6 months of the date of the exchange agreement on such further period as the parties may mutually agree to in writing. The exchange agreement provided for time to be of essence and also extension of time in writing.

The completion of the sale agreement was subject to completion under the exchange agreement, i.e. on the plaintiffs obtaining GWP and building approval within the time stipulated or within any agreed extension of that time.

The plaintiffs failed to obtain the GWP and building approval by the stipulated time and prior to that date requested for extension of time. The defendants entirely ignored or declined these requests.

The plaintiffs began proceedings against the defendants *inter alia*, a declaration that both agreements continued to be valid and subsisting as an injunction to restrain the defendants from conveying the land to any 3rd party.

The plaintiffs obtained an interim injunction, *ex parte* and the *lis pendens*.

The plaintiffs subsequently applied for continuation of the *ex parte* injunction, but this was rejected. The plaintiffs appealed against that decision.

The defendants, on the other hand, applied for an order under O. 18 r. 19 or alternatively under the Court's inherent jurisdiction for the statement of claim to be struck out on the grounds that it discloses no reasonable cause of action; that it is frivolous and vexatious and that it amounts to an abuse of the process and for the *lis pendens* to be discharged, to which the Judge declined to strike out the statement of claim but discharged the *lis pendens*. The defendants appealed against the refusal to strike out the statement of claim.

Held:

(As to the Plaintiffs' Appeal)

[1] The interim injunction ought not to be continued and the *lis pendens* be discharged on the grounds:

(i) that time was of essence and the plaintiffs had failed to obtain the GWP and building approval by the contractually stipulated date.

(ii) the condition requiring the GWP and building approval was not a condition for the benefit of the plaintiff, but that it ensured for the benefit of both the vendors and the purchasers and was therefore not capable of being waived by the plaintiffs/purchasers unilaterally.

(iii) the defendants were not obliged to grant the plaintiffs' an extension of time.

(iv) on the balance of convenience, i.e. if the GWP and building approval were not obtained shortly, the land was likely to be compulsively acquired.

[2] Damages awarded to the plaintiffs.

(As to the Defendants Claims)

1. No order to strike out the statement of claims on the face of it, the statement of claim disclosed a reasonable cause of action and was manifestly not an abuse of the process of Court. Also the plaintiffs's claim cannot be desented as frivolous and vexatious.

2. The *lis pendens* should be discharged.

3. As the defendants succeeded in their prayer seeking a discharge of the *lis pendens*, the Court awarded the defendants half their taxed costs of the summons.

[Order accordingly.]

Cases referred to:

Hubbuck v. Wilkinson [1899] 1 QB 86
Att-Gen of the Duchy of Lancaster v. L & N W. Rly. Co. [1892] 3 Ch 274
Dyson v. Att-Gen [1911] 1 KB 410
Lawrance v. Norreys [1890] 15 AC 210
Lea v. Thursby [1904] 90 LJ 65
Emerson v. Grimsby Times etc [1926] 42 TLR 238

For the plaintiffs - Cheong Yuen Hee; M/s. Chow Peng & Partners
For the defendants - Namazie (Tan Teng Muan with him); M/s. Mallal & Namazie

JUDGMENT

Joseph Grimberg JC:

The plaintiffs in these proceedings entered into separate agreements for the purchase from the defendants of the defendants' respective interests in two parcels of land ("the land"). Both agreements ("the exchange agreement" and the "sale agreement" respectively) were dated 4 August 1987. The exchange agreement was concluded between the plaintiffs and the 1st to 6th defendants; the sale agreement was entered into between the plaintiffs and the 7th and 8th defendants.

By Clause 14 of the exchange agreement, read with its other terms, it became a condition precedent of that agreement that a grant of written permission ("the GWP") and building plan approval ("building approval") in respect of the land be obtained by the plaintiffs within

6 months of the date of the exchange agreement, "or such further period as the parties may in the meantime mutually agree to in writing". The clause proceeds thus:

> Thereafter if (the GWP) or (building approval) is not obtained this agreement shall automatically determine and each party shall be released from any further obligation under this agreement and neither party shall have any claim against the other.

Clause 8 of the exchange agreement provided for time to be of the essence in relation to all its provisions.

It followed from Clause 14 of the exchange agreement that, subject to the parties agreeing on extension of time in writing, the plaintiffs had until 3 February 1988 within which to secure the GWP and building approval.

By Clause 3 of the sales agreement, completion under it was subject, *inter alia*, to completion under the exchange agreement. Thus, for all practical purposes, completion of both agreements turned on the plaintiffs obtaining GWP and building approval within the time stipulated by Clause 14 of the exchange agreement, or within any agreed extension of that time. The agreements were linked in this critical respect.

In the event, the plaintiffs failed to obtain the GWP and building approval by 3 February 1988. Prior to this date the plaintiffs requested the defendants for an extension of time, in the first instance for an indeterminate period and subsequently for six months, within which to secure the GWP and building approval. The defendants either ignored or declined these requests.

On 16 August 1988, some six months after the date upon which they were obliged to secure the GWP and building approval, the plaintiffs began these proceedings against the defendants. They claimed, *inter alia*, a declaration that the exchange agreement and sale agreement continued to be valid and subsisting, and an injunction to restrain the defendants from conveying the land to any third party.

On 17 August 1988, I granted the plaintiffs an injunction, *ex parte*, in those terms.

On 9 September and 24 October 1988 the plaintiffs applied for *ex parte*, and obtained from a Judge in chambers, declarations that their right, title and interest to and in the land was in question, and that the declarations be enforced as *lis pendens* for a period of 12 months from the date of each order. I shall refer to these orders collectively as "the *lis pendens*".

Meanwhile, on 26 August 1988 the plaintiffs had filed a motion for the continuation of the *ex parte* injunction granted by me on 17 August. The plaintiffs' motion was heard by me, *inter partes*, on 13 June 1989. I declined to continue the *ex parte* interim injunction, and awarded the defendants the costs of the plaintiffs' motion. The plaintiffs' Counsel asked for further argument, after hearing which I confirmed my order refusing to continue the injunction. I gave an oral judgment ("the oral judgment"), a transcript of which, since it is relevant, is annexed as a schedule to these grounds of decision. The plaintiffs now appeal against my order vacating the lis perdens, but not against the order by which I declined to continue the injunction. In regard to that appeal, I have nothing to add to the oral judgment.

By summons filed on 17 May 1989, the defendants applied:

(i) under O. 18 r. 19 or alternatively under the Court's inherent jurisdiction, for the statement of claim to be struck out; and

(ii) for the *lis pendens* to be discharged.

I heard this summons on 26 June 1989, I declined to strike out the plaintiffs' statement of claim, but discharged the *lis pendens*. The defendants now appeal against my refusal to strike out. There is no appeal by the plaintiffs against the order discharging the *lis pendens*.

The defendants sought a striking out of the statement of claim on the grounds that it discloses no reasonable cause of action; that it is frivolous and vexatious, and that it amounts to an abuse of the process. The grounds upon which a party is entitled to a striking out order have been stated on many occasions, and in different ways, for example "... only in plain and obvious cases..." - *Hubbuck v. Wilkinson* [1899] 1 QB 86, at p. 91; when the claim or answer is on the face of it "obviously unsustainable" - *Att-Gen of the Duchy of Lancaster v. L & N W Rly Co* [1892] 3 Ch 274; ... where the cause of action is "obviously bad and almost incontestably bad" - *Dyson v. Att Gen* [1911] 1 KB 410, at p. 419.

By para. 11 of the statement of claim, it is asserted that the plaintiffs took all necessary steps to obtain the GWP and building approval within the period stipulated by the exchange agreement. the steps so taken are particularised under that paragraph.

It is further asserted by para. 14 of the statement of claim that the condition requiring the GWP and building approval to be obtained within 6 months of the date of the exchange agreement is a condition for the benefit of the plaintiffs, which the plaintiffs could and did waive. It was also alleged that the defendants were obliged to agree on an extension of time for the securing of the GWP and building approval, and were in breach of an implied term of the exchange agreement by preventing the plaintiffs from obtaining the GWP and building approval.

It is plain from the terms of the oral judgment, that I concluded:

(i) that time was of the essence and that the plaintiffs had failed to obtain the GWP and building approval by the contractually stipulated date, for which they only had themselves to blame;

(ii) that the condition requiring the GWP and building approval to be obtained by that date was not a condition for the benefit of the plaintiffs, but that it enured for the benefit of both the vendors and the purchasers, and was therefore not capable of being waived by the plaintiffs/purchasers unilaterally; and

(iii) that the defendants were not obliged to grant the plaintiffs an extension of time.

Those conclusions were enough to persuade me that the injunction ought not to be continued. I was influenced by balance of convenience considerations, because it was common ground that if the GWP and building approval were not obtained shortly, the land was likely to be compulsorily acquired. The plaintiffs had put it beyond themselves to secure the GWP and building approval expeditiously; whereas if the injunction were discharged an alternative buyer was available, who might prove to be the defendants' white knight and save the land from acquisition. For all these reasons I declined to continue the injunction, and discharged the *lis pendens* by the same process of reasoning.

In my judgment, to strike out the statement of claim and thus "drive the plaintiffs from the judgment seat", and a possible remedy in damages, is a different matter. It was not, in my view, a plain or obvious case for a striking out since the statement of claim, on the face of it, disclosed a reasonable cause of action. The plaintiffs' claim was manifestly not an abuse of the process, in the sense of Lord Herschell's dictum in *Lawrance v. Norreys* [1890] 15 AC 210, which was in the following terms:

> It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could to proved.

As for the defendants' contention that the claim is frivolous and vexatious, the authorities are clear that for an action to be stopped in its tracks that contention must be clearly made out. It might, for example, be so said if the action were not brought "in good faith, to try a legal point which ought to be tried" - see *Lea v. Thursby* [1904] 90 LJ 65, discussing the decision of the Judge at first instance; or if the claim were, on the face of it, "obviously ridiculous" or "absurd", as was the case in *Emerson v. Grimsby Times* etc. [1926] 42 TLR 238.

In my judgment, the plaintiffs' claim in this case cannot be described as frivolous and vexatious. It merits a full trial, despite my conclusion that a case was not made out for the continuation of the interim injunction. It was implicit in that finding that the plaintiffs should be left to their remedy in damages, a situation which junior Counsel for the defendants appeared to accept in support of his argument that the *lis pendens* should be discharged.

It was for all the reasons I have stated that I declined to make an order striking out the statement of claim. Since the defendants failed on this prayer of their summons, but succeeded in the prayer seeking a discharge of the *lis pendens*, I awarded the defendants half their taxed costs of the summons.

SCHEDULE

Oral Judgment

I have sought to approach this case, not only in accordance with what I understand the law to be, but also I hope with some pragmatism.

Boiled down to the barest essentials, the defendants agreed to sell their respective interest in a piece of land to the plaintiffs, subject to the plaintiffs obtaining a grant of written permission, and building approval, not later than 6 months from the date of the agreement for sale. The obtaining of that grant, as well as of the building approval, depended on the plaintiffs. It was they who were to make the appropriate applications, subject to the defendants assisting as and when they might be required to do so.

Time was of the essence of the agreement, which was freely negotiated at the time when the plaintiffs were under advice from solicitors. It is obvious from the face of the agreement that it was prepared by solicitors. The plaintiffs entered into the agreement with their eyes open, fully conversant with what their obligations were under it. In my judgment, the condition in the agreement requiring that the grant of written permission, and building approval, be obtained within the stipulated time was for the benefit of all parties to the agreement, and not simply for the benefit of the plaintiffs. The defendants were entitled to know where they stood because a threat of compulsory acquisition was hanging over the property at that time, and hangs over the property now. If the plaintiffs failed to obtain the grant of written permission, and building approval, within the stipulated time, the defendants were entitled to look elsewhere for rescue from the clutches of the Collector of Land Revenue. In my view, the defendants were under no obligation in that situation to grant the plaintiffs an extension of time for fulfilling the plaintiffs' obligations under the agreement, although a provision entitling the defendants to grant such an extension was to be found in the agreement.

In the event, the plaintiffs failed to obtain a grant of written permission, and building approval, by the contractually stipulated date. The blame for their failure to do so can properly be laid at their own door, because they declined to allow their architects to apply for early determination of the development charge. Grants of written permission, and building approval, cannot be obtained unless the development charge is first paid. By the time the plaintiffs galvanised themselves into action, there was absolutely no way that the grant or building approval could have been obtained by the date stipulated in the agreement.

In that situation the plaintiffs came to me, *ex parte*, well after the deadline for the obtaining of the grant of written permission and building approval had expired, and asked for an injunction to restrain the defendants from selling the land to anyone else. I granted them the injunction they sought. I say no more than that certain critical information, adverse to the plaintiffs, was not before me when I made the ex parte order, but I hasten to add that I do not suggest for a moment that the information was deliberately withheld.

Now, when the plaintiffs came before me for continuation of the injunction, *inter partes*, I declined to continue it after full argument, with all the relevant facts before me. I was then called upon to decide whether a lis pendens registered against the land by the plaintiffs ought to be discharged. To have allowed the lis to remain registered against the property would have defeated the order I made declining to continue the *ex parte* injunction. I have now heard further argument, and I can see no reason for altering my decision to the discharge the *lis pendens*.

In my judgment, the arguments against the continuation of the interim injunction, which arguments I upheld, apply equally to the issue as to whether the *lis pendens* should stay. I hold that there is sufficient reason, for the purposes of the old Rules of the Supreme Court, O. 47 r. 23(1), for the *lis pendens* to be discharged, and I so order in my discretion in equity.

I should add that I do not consider that I am precluded from making that order by reason of the fact that I have declined to strike out the plaintiffs' action on the grounds that it is frivolous and vexatious and/or an abuse of the process.

Insofar as the application to stay the order for the discharge of the *lis pendens* is concerned, I am obliged to decline a stay because to stay the order would be to render largely nugatory the orders by which I refused to continue the interim injunction and discharged the *lis pendens*.

The order for costs previously made stands, and I make no order with reference to the costs of today.

There will be leave to appeal.

Also found at [1989] 2 CLJ 1124